Time Is of the Essence

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The announced veto of the Hungarian and Polish governments on the EU multi-annual budget and the European recovery fund has caused a major stir in recent days in Europe. The motives for the veto are not related to the package itself, which is indeed beneficial for both countries, but are linked to the conditionality mechanism to protect EU funds against general deficiencies in the rule of law. Blocking the new financial package due to that mechanism stands in clear opposition to the both governments' repeated claims that the rule of law in both countries is fully respected. Those who come with clean hands should not be afraid of the new procedure.

The conditionality mechanism is designed to safeguard the Union's financial interests and complements the existing political and judicial mechanisms. It is expedient to review the state of play of the procedures in place and, if necessary, to pose questions, whether they stand up to the challenges posed by developments in the respective countries, if they are carried out in a timely manner and focus on genuine effectiveness.

1. The EU institutions have not yet confirmed the potential of the mechanism set out in **Article 7 TEU**. After initiating the warning procedure against Poland (2017) and Hungary (2018), it got trapped in hearings at the Council of the European Union, and despite the continued decline of the rule of law in both countries, there is a visible lack of leadership in its further implementation.

2. In turn, for several years now, the Court of Justice of the European Union and the European Court of Human Rights have been handling cases concerning the rule of law in Poland. The Strasbourg Court has not yet issued any ruling, even though it has received a number of individual applications for over two years. In contrast, the Luxembourg Court has already pronounced a few crucial judgments (e.g. C-216/18 *LM*; C-585, 624 and 625/18 *A.K. and others*; C-619/18 *Independence of the Supreme Court*; C-192/18 *Independence of the common courts*), detailing elements of the rule of law and judicial independence. In the infringement cases, the Court also pointed to several major breaches of EU principles by the Polish government. However, some of the CJEU judgments have not been fully complied with by the Polish authorities, which undermines the autonomy and *effet utile* of CJEU rulings and EU law.

Currently, we are at a stage when various proceedings are underway, and each of them may be important to halt the negative effects of changes in the Polish judiciary. Alongside the political process of linking respect for the rule of law to the future EU budget, several issues relating to European judicial procedures should be pointed out.

3. It is necessary for the European Commission to bring without delay an infringement action to the Court of Justice against the Law of 20 December 2019

concerning the judicial system, usually referred to as the "**Muzzle Law**". The law prohibits the examination of the lawfulness of appointment procedures of judges nominated by the new unconstitutionally staffed National Council of the Judiciary. In addition, the Law vests the exclusive power to rule on the independence of judges in the Supreme Court's Chamber of Extraordinary Control and Public Affairs, staffed with persons affected by the same deficiencies as those about which they are to decide (*nemo iudex*).

So far, the Commission has moved to the second phase of the infringement procedure and presented, on 30 October 2020, a reasoned opinion to the Polish government, which has now two months to respond. However, only referring the case to the Court may provide for a possibility to reduce the negative effects of this law. The content of the Muzzle Law has been known for more than 11 months. Already in January 2020 the opinion of the Venice Commission on this Law was published, and Vera Jourová has visited Warsaw to officially signal the concern of the European Commission. Since the Muzzle Law entered into force in March 2020 it has been hampering the actual application of the *A.K.* ruling which set out the method and criteria for assessing judicial independence. The harm has already been done. Delay in responding to a legislation that is flagrantly inconsistent with EU law results in illegitimate changes accepted as *faits accomplis*.

4. The European Commission should have requested the CJEU to impose penalties on Poland for failure to fully comply with the interim measures of 8 April 2020 suspending the **Disciplinary Chamber** of the Supreme Court (C-791/19 R). The view that the Court's order applies only to disciplinary cases and not to cases for waiving judicial immunity is unfounded.

Firstly, in the cases of judges Pawe# Juszczyszyn, Beata Morawiec, and most recently Igor Tuleya, the Chamber suspended them from professional duties for an indefinite period and reduced their pay for the duration of the suspension. The provisions on the suspension of judges and reduction of their salary are of disciplinary nature. Secondly, a decision to lift judicial immunity may lead to more severe consequences than initiating disciplinary proceedings, since it opens the door to criminal sanctions against the judge. Thirdly, judicial independence is an indivisible guarantee. If there are legitimate grounds to consider that the Disciplinary Chamber lacks the necessary guarantees of independence and impartiality to rule in disciplinary cases, it equally lacks the guarantees to decide on waiving the immunity of a judge. Likewise, if the independence of a judge may be undermined by disciplinary proceedings, it may be threatened even more by criminal proceedings, especially when they are politically motivated and initiated with respect to the judge's judicial activity.

In consequence, the "immunity" proceedings may have more far-reaching consequences than regular disciplinary cases, and thus can even less be decided by the Disciplinary Chamber after the CJEU order. If the European Commission is in doubt about the meaning or the scope of the April order, it should apply to the Court to construe it (Art. 158 (1) CJEU Rules of Procedure), or alternatively, if the Commission is following a restrictive interpretation of the order, it should promptly submit a supplementary application and request further interim measures.

5. On 1st December 2020, there will be a hearing on **disciplinary regime for Polish judges** before the Grand Chamber (C-791/19 *Commission v. Poland*). It is noteworthy that a number of EU states decided to intervene at the hearing: Belgium, Denmark, Finland, the Netherlands and Sweden.

The Ombudsman has repeatedly taken action to defend judges against whom disciplinary proceedings or preliminary investigations have been initiated on no legitimate grounds and applied as a form of pressure. There has emerged a clear pattern of a system of disciplinary responsibility used with the intention of compromising judicial independence. The initiation of disciplinary proceedings against judges who stand up for judicial independence has been employed as a "routine" tool of intimidation and has become a "normal" practice for disciplinary officers appointed by the Minister of Justice. The current system of judges' responsibility has been deliberately designed to use it as an instrument of control over courts. The measures taken demonstrate constant and intentional pressure on judges, applied in a programmed and immediate manner. Before the upcoming hearing, the Ombudsman will draft a report on action taken by the Ombudsman's Office with respect to the abusive use of the disciplinary regime.

6. The next few months will mark important developments in Luxembourg. They will bring awaited opinions of Advocate General E. Tanchev in preliminary ruling procedures: on 17 December 2020 on the right of effective appeal against resolutions of the National Council of the Judiciary refusing nominations to the Supreme Court (case C-824/18 *A.B. and others*) and on 12 January 2021 on the **status of new Supreme Court judges** appointed on recommendations issued by the NCJ (cases C-487/19 *W.#.* and C-508/19 *Prokurator Generalny*). The status of the new Supreme Court judges is also covered by the case C-132/20 *Getin Noble Bank*, in which the Ombudsman requested that questions put forward by a judge who was established in flagrant violation of the law be declared inadmissible.

7. The execution of **European arrest warrants** (EAW) issued by Polish courts remains a major issue. In a stringent assessment the Rechtbank Amsterdam concluded that the independence of the judiciary in Poland is currently under threat to such a degree that no Polish court can guarantee the right of the transferred person to a fair trial. It led the Dutch court to raise the question whether such a general assessment is sufficient to refuse execution of Polish warrants. In a recent succinct opinion Advocate General Campos Sánchez-Bordona indicated that the suspension of the EAW cannot be automatic even if a general threat to judicial independence is identified. Nonetheless, the concerns expressed, and not only by the Dutch court, should prompt the Commission to examine in depth the functioning of the EAW mechanism. What damage to the functioning of this institution has been caused by delays in the execution of the EAW? What changes to the EAW system are needed to make the mechanism more effective, e.g. with regard to judicial dialogue between the executing court and the issuing court? How to ensure the proper functioning of a cooperation mechanism based on mutual recognition of judicial decisions, without sacrificing the principle of the rule of law which forms the very foundation for mutual trust among the EU members and their judiciaries?

8. Cases concerning the rule of law and judicial independence should be given due priority by the **European Court of Human Rights**. Apart from communicating complaints to the government, the Court has so far remained silent on these cases. None of them has been ruled on yet, although some were brought to Strasbourg more than two years ago (e.g. cases *Grz#da v. Poland*; *Broda and Bojara v. Poland*). If the right to a fair trial before an independent court is not considered in Strasbourg as belonging to Convention's core rights, this stance needs to be revised. Unless this right is fully guaranteed, the protection of all the Convention rights is at risk. There are compelling reasons to handle the rule of law cases in an expedited manner.

It is desirable to hold hearings in rule-of-law cases, for they provide an opportunity to properly articulate both systemic problems and violations of judges' individual rights (e.g. in the context of cases *Tuleya v. Poland* or *#urek v. Poland*). Third-party interveners that were previously granted leave by the Court to join the case, should also be admitted to the hearing. The experience of the Polish Ombudsman from his participation in a number of cases before the Court in Luxembourg, in both written and oral proceedings, shows that such a contribution, in addition to the pleadings of the main parties, allows the Court to examine the context of the case, its possible consequences and the relevant legal argumentation more thoroughly. Likewise, it also helps the Court to verify the accuracy of submissions made by other parties.

If the ECtHR would not decide to hold a hearing in a given case, it is essential to close proceedings in a timely manner and adopt a ruling. The passing of time and the nature of the issues raised in the cases pending before the Court, in light of the excessive length of Strasbourg proceedings, make it increasingly difficult to bring the national situation back into line with Convention standards. The basic problems of the Polish justice system have been waiting long enough for review in Strasbourg. The Court's assessment is pending, i.a., for the premature termination of the term of office of judges-members of the previous National Council of the Judiciary (*Grz#da v. Poland*; *#urek v. Poland*); the status of persons appointed to the Supreme Court since 2018 (*Reczkowicz and others v. Poland*); or resorting to the regime of disciplinary responsibility of judges to exert illegitimate pressure and suppress their critical views on changes in the judiciary (*#urek v. Poland*, *Tuleya v. Poland*). One of the cases which was brought almost three years ago, in early January 2018, concerns the status of the Polish Constitutional Tribunal and persons who adjudicate in it while not having the status of a judge because their seats were previously properly filled (*Xero Flor v. Poland*). Following the Tribunal's ruling of 22 October 2020 on the admissibility of a lawful abortion (case K 1/20), it is hardly possible to provide a better example of how crucial such issues are for the rule of law in Poland. We should not forget that the ruling has provoked about half a million Polish citizens to participate in manifestations, despite the pandemic. Moreover, the ruling until today has not been officially published by the Prime Minister, which is his legal duty and yet another example of instability of the Polish constitutional system.

9. We look forward to the judgment of the Grand Chamber in the case of *Guðmundur Andri Ástráðsson v. Iceland* that was adopted in mid-September and is to be announced on 1 December 2020. The hearing before the Grand Chamber was held on 5 February 2020, and since the case is of fundamental importance for

many European countries struggling with the excessive and arbitrary influence of the executive on the procedures for the appointment of judges, the ECtHR should have taken that into account and not delayed the final say. Together with the earlier CJEU judgment in case C-542 and 543/18 *Simpson and HG*, the upcoming ECtHR ruling provides the opportunity to corroborate the criteria and guarantees of the **pan-European standard** of an independent and impartial court established by law.

10. Any final decisions of the Disciplinary Chamber of the Supreme Court, as in the cases of judges Juszczyszyn, Morawiec or Tuleya, should result in a complaint to the European Court of Human Rights, as well as applications for Rule-39 **interim measures** to suspend the Chamber's decisions. Although the ECtHR has not yet granted urgent measures in cases involving the rule of law, Polish cases, due to their nature, weight and irreversible consequences, should perhaps set a precedent.

The Court's refusal of 26 November 2020 to grant interim measures on the application filed by Judge Tuleya two days before, is a matter of concern. Similarly, in July 2020, the Court did not grant interim measures in the case of *Gyulumyan and Others v. Armenia*, in which the term of office of judges of the Constitutional Court was prematurely terminated. In both cases, the applicants did not receive the actual ECtHR's decisions, but were only informed of them. In the Armenian case, however, the Court also issued a press release, in which it laconically indicated that the request was rejected as being outside the scope of application of Rule 39, and did not involve a risk of serious and irreparable harm of a core right under the Convention. There has been no similar press release on Judge Tuleya's application so far.

We are critical of the rigid policy of the Strasbourg Court in administering urgent measures. One should call on the Court to provide applicants not only with information about the decision, but a full reasoned decision. In both cases, the refusal to grant interim measures has a fundamental impact on the applicants' professional situation, in fact accepting that they were deprived of their judicial positions. Such a situation may be irreversible, even if – after some time – a favorable ruling is rendered for the complainant.

Nonetheless, we believe that it is worthwhile to initiate a debate on the issue and present arguments for a change in the Court's highly restrictive approach. There are no clear obstacles for the Strasbourg Court to use the instruments it possesses more proactively and widely. It could draw some inspiration from the CJEU practice which has proven that interim measures can be an effective instrument of safeguarding individuals' rights.

In the context of proceedings to waive judicial immunity, it should be taken into account that the Disciplinary Chamber has been established in violation of the law in the first place and has been staffed in a process that has not guaranteed the independence and impartiality of the persons appointed. While this issue requires an assessment by the Court in the main proceeding, until such time as it is done, individuals should not suffer from measures imposed by that body. There are sufficient grounds to support *prima facie* such an assessment which should permit the application of interim measures – the judgments of the Polish Supreme Court

of 5 December 2019 and 15 January 2020, as well as the resolution of the joint chambers of the Supreme Court of 23 January 2020. All of them clearly stated that the Disciplinary Chamber is not a court. The ECtHR should also take into account the CJEU order of 8 April 2020, in which the Court recognized that the independence of the Chamber may not be guaranteed, which may pose a threat to the independence of the Polish judiciary (para. 89).

Decisions of the Disciplinary Chamber to lift judges' immunity, while leading to suspension and reduction of their pay, are not mere "technical" decisions necessary to commence criminal proceedings. The ruling majority invokes arguments referring to the equality of all before the law and the need to bring judges to justice for their actions. This rhetoric is deceptive. The measures are targeted at concrete persons, affect well-known judges, who take decisions that do not meet the expectations of the government, who are critical of changes in the judiciary, who call for the full guarantee of independence, and who are active in judicial associations. The apparent justification of the government, claiming to protect the rule of law is meant to disguise the true aims of the measures: to remove them *de facto* from adjudication for a longer, unspecified period of time; to place them in a situation of uncertainty and anxiety about their future; to damage their social and professional reputation; to undermine their life achievements. In addition, by their very nature, these measures are decided on an individual basis, yet they are also taken with the intention of generally impacting the entire judicial community in Poland. They indeed constitute an extremely dangerous interference with judicial independence.

11. The selection procedure for the judge at the ECtHR is currently underway in Poland. It should be as transparent as possible, based on clear substantive criteria and fair procedural rules. For it is worth remembering that it will be the Court in Strasbourg, with the participation of the **new Polish judge**, that will decide on many cases concerning the rule of law. Similarly, the term of office of the current Polish judge at the CJEU in Luxembourg comes to an end in 2021 as well. Again, one should expect that the Polish government proposes a candidate with the highest professional and personal qualifications, whose independence is beyond doubt.

12. Deficiencies in the rule of law entail serious consequences for the protection of the rights of many people. A good example are the cases of local self-governmental bodies which adopted resolutions against the so-called "LGBT ideology". In four judgments, following complaints filed by the Ombudsman, the voivodeship **administrative courts** overturned these resolutions. However, all the cases will soon be reviewed by the Supreme Administrative Court as a result of cassation complaints. In this context, one should look at the nomination procedure to the Supreme Administrative Court in the coming months. Concerns are being raised as to whether it will not undermine the independence of this Court, especially since the nominations are sought by persons directly related to the Ministry of Justice. Moreover, it should be noted that the General Public Prosecutor, who is at the same time the Minister of Justice, is a party to the cassation proceedings. Previously, the Prosecutor has strongly endorsed the view of both those local authorities who passed the resolutions and the "Ordo Iuris" Foundation which inspired the adoption of the anti-LGBT acts on the local level.

13. Poland is soon to be visited by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe. Poland is the sole EU Member State that is under such **monitoring procedure**. Having concluded that recent reforms severely damaged the independence of the judiciary and the rule of law, the Parliamentary Assembly opened the monitoring of Poland in January 2020. The Monitoring Committee focuses not only on issues related to the judiciary, but also on the functioning of the public prosecutor's office and the public media. Indeed, it is in the interest of all those who care about the rule of law that the Monitoring Committee is best informed about the situation in Poland. We should also be mindful of the Venice Commission's critical opinions on secret services and their excessive powers.

14. In our opinion, the European approach towards the rule of law in Poland should not only focus on budgetary discussions and the conditionality mechanism. Important effects could be achieved as a result of consequent use of existing legal and political procedures. However, one should not forget that time is of essence. Any unnecessary delay, any dubious reluctance on the part of the CJEU, the ECtHR or political institutions, creates additional possibility for further negative developments. This is not just theoretical discussion any longer. Judges Juszczyszyn, Morawiec and Tuleya are the real victims. They may without any doubt say that so far both Polish and European institutions have failed to protect their status as independent judges, belonging to the family of European judges.
